

## **CONSTITUTIONAL MONARCHY IN NEPAL: LESSONS TO BE LEARNED**

In 1991 a new constitution was promulgated which embraced new values and new institutions such as constitutional monarchy, multi-party democracy, parliamentary system, independence of judiciary and universal adult franchise. The promulgation of this new constitution marked the beginning of new era where in the responsibility for governance and management of the country passed on to party based elected government and the King gracefully withdrew from active politics and governance responsibility. The new system based on multi-party system and constitutional monarchy lasted for little over ten years and the country once again has gone in to active leadership of His Majesty the King. Nepal at present is ruled by the government led by His Majesty the King and the entire system of multi-party democracy and constitutional monarchy has been practically non-operative and non-functional. The party leaders who were at the helm of the affairs then are either in jails or in the streets. During this interregnum period of ten years of constitutional monarchy and multi-party democracy, Nepal's experience with monarchy has been quite rich and the lessons learned can be of substantial interest to a country like Bhutan.

The kingship in Nepal has come a long way. It has seen many ups and downs over a period of long time in the history of Nepal. And yet the challenges to the kingship remains a matter of concern to many students of constitutional development and politics. There are many challenges but the monarchy has its own constraints to take on those challenges. Hence the facing of these challenges in efficient manner would call for wisdom, statesmanship, hard work and sincere support from the monarchy to the process of strengthening and institutionalization of multi-party democracy.

The new constitution of Nepal, to put simply, is nothing but the terms of reference clearly defining the job description of different institutions such as Prime Minister, council of ministers and His Majesty the King. Respect for job allocation and commitment for democracy are the two basic foundations for constitutional monarchy. And these two considerations ought to guide all the constitutional bodies including the King, cabinet, parliament, judiciary, constitutional bodies and the opposition party. Failure of any institution to abide by the above considerations may put a constitution abiding King in to an awkward position. A constitution abiding constitutional monarch could neither punish nor criticize delinquent political leaders and constitutional office holders<sup>1</sup>. He has no option but to tolerate misbehaviors of his ministers and elected representatives and patiently wait for the people to punish them by voting out in general election. Late King Birendra reigned as a constitutional monarch under the new constitution for almost eleven years. He for his own reasons preferred to tolerate corrupt leaders and suffer humiliation at the hands of delinquent leaders until he died in royal massacre.

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<sup>1</sup> Under The Constitution of the Kingdom of Nepal 2047 the King cannot dismiss the ministers unless he is advised to do so by the Prime Minister and He cannot dismiss the Prime Minister also unless the parliament passes vote of no confidence against him.

One of the biggest challenges faced by the King of Nepal in the system of constitutional monarchy is in the areas of its relation with cabinet. King cabinet relation is the heart and soul of the constitutional monarchy and failure on the part of either party to act according to established constitutional norms could put the political system off the track. Much of the political efforts need to be directed to perfect and institutionalize this relationship. The relationship of the King and the Cabinet is a matter of political question<sup>2</sup>. The Nepalese constitution not only rule out any inquiry in to the relationship it also expects the matter to be solved through political process and mutual understanding. Reference may be made to the Supreme Court decision in *Radheshyam Adhikari vs. Cabinet Secretariat et all.*<sup>3</sup> In this case the petitioner alleged that the two of the ambassadors had been appointed by the King without the recommendation of the council of ministers and hence was unconstitutional. The Supreme Court ruled that the constitution did not allow it to question the relationship between the King and the Cabinet. It could not issue an order to either King or the Council of Ministers to disclose as to if there was any recommendation and if so what was the recommendation. The court could take judicial notice of the official disclosures made in this regard but it could not compel them to disclose what the recommendation was.

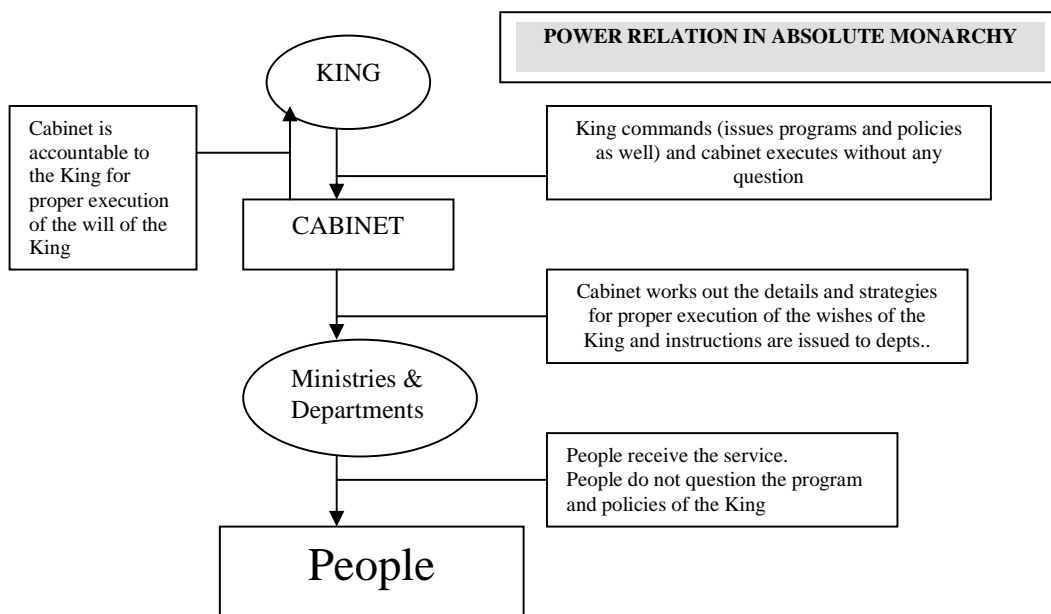
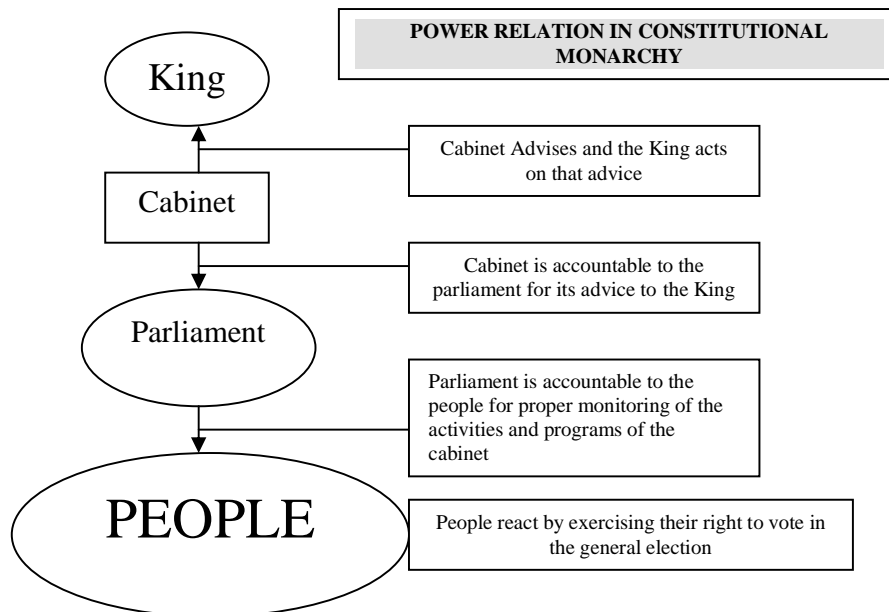
The tensions and deviations in the relationship between the King and the cabinet is always recommended to be sorted out at the highest level in a closed door conference. It will be the biggest treachery if any minister tries to take the matter of confidential consultation with the King to the press. Political leaders in the government have access to the press, people and politics but not to the constitutional monarch. The leaders can explain their conduct to their electorate but the constitutional monarch cannot do so. The leaders therefore should refrain from using media to deal with differences or tensions in King Cabinet relation. People feel politically secure when they see harmony in this relationship and not when they see differences. Nepal's experience in this area has been not very encouraging. In the past both the ministers and the King in Nepal has used the media to ventilate their grievances against each other.

The King cabinet relationship in constitutional monarchy cannot be equated with the King cabinet relationship in absolute monarchy. In the former the King has to act according to aid and advice of the elected government whereas in the latter the government acts on the command of the King. In absolute monarchy the chain of command is top down but in the case of constitutional monarchy the decision making process is bottom up.

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<sup>2</sup> Article 35(6) of the Nepalese constitution prevent the court of law from raising any question on recommendation tendered to the King. The Article reads as follows: *No question shall be raised in any court as to whether or not any recommendation or advice has been given to His Majesty pursuant to this Constitution by the council of Ministers or any other institution or official, nor shall any question be raised in any court about what recommendation or advice has been given.*

<sup>3</sup> Nepal Kanoon Patrika 2048 Vol 12 P 810



The transition from top down culture to bottom up culture may be very difficult process despite of best intentions. We must have profound respect to this constraint and cooperate with the King in transition of this culture as long as the King is sincere and does not have bad intentions towards democracy and peoples' right. In Nepal the leaders

failed to be sensitive to this constraint of the Late King Birendra. The Kings and crown princes in Nepal have been brought up in an environment where they have always issued commands. This hard reality remained ignored and the leaders never tried to understand that it takes time for them to adjust with new constitutional environment. The political leaders also failed to realize that responsibility basically lies with them to help the King and his family to slowly attune their way of life with the norms of the constitutional monarchy. It was very childish for the political leaders to expect the King to change his way of life overnight.<sup>4</sup>

Under the constitutional scheme of Nepal, the King has to act on the advice of the cabinet. But there are times when the King believes advice to him to be wrong. He may some times dare to refuse to take it and if his ministers yield, the sovereign is justified. However if the ministers persist on their decision, feeling that they have the backing of the majority in the parliament, a constitutional monarch must give in. But there are also times when he is faced with conflicting advices from his court officials on the one hand and the cabinet on the other hand. In such situations the King may discuss the matter with the court officials but must act as per the advice of the cabinet if the latter persists. The ministers are democratically responsible advisors but not court officials. These are some of the issues which need to be educated and informed to the King over a period of time to ensure proper functioning of constitutional monarchy. Monarchy needs education and orientation and this gap need to be carefully filled up in a most elegant manner without compromising traditional culture of royal dignity and respect. Constitutional monarchy is a very sophisticated system and its success requires matured behavior from leaders of the government vis a vis His Majesty the King and a very responsible program vis a vis its people. In Nepal there was clear sign of gap in this area for almost eleven years of multiparty rule.

The success of constitutional monarchy depends on the political environment where in it is being sought to be introduced. If the system is introduced with the initiative of the King, just as it is being sought to be done in Bhutan, its chances of success is higher. The King will own the system and he will take the pride in its success. He will try his best to cooperate and make it successful. But if the system of constitutional monarchy is introduced as a matter of compulsion and due to irresistible pressure of the people alone and if the King is not a willing party to such change, the challenges before the political parties and leaders to make it successful will be very formidable and multiple. An unwilling and uncooperative King can be a great obstacle for its success.

Under the constitutional scheme of Nepal, there are many governmental decisions which could be legitimized and put in to effect without having formally presented to the King. Take for instance the signing of the Tanakpur treaty<sup>5</sup> by the then Prime Minister Girija

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<sup>4</sup> The major drawback with the hereditary head of the state is that the people have to live with the rightful heir to the throne irrespective of the quality and character he possess. People have no choice. The King lives in remote world and is often unaware of the hard realities of life down on the streets.

<sup>5</sup> Tanakpur treaty provided for watersharing of the border river and construction of afflux bund by India in Nepalese territory. Article 126 of the constitution of Nepal do not require the consent of the King for any treaty making. It requires the treaty to be placed for parliamentary ratification by joint sitting of the parliament if it involves sharing of resources ..... The Article reads as follows: (1) *The ratification*

Prasad Koirala. In these kinds of cases the King may remain uninformed and ignored. He may even be deprived of his right to consultation. Many policy decisions may come as a surprise to the crown. It could be simply an arrogance of the Prime Minister that he never thought it necessary to inform and consult the King. Or it could even be just an accident or inconvenience. Reference may be made to a case where His Majesty the late King Birendra sent a letter to the Prime Minister demanding information on flood situation in Nepal. It is very unfortunate that this single incident was given negative interpretation by some responsible leaders. The letter at that time in fact indicated the level of frustration of the crown in its relation with the elected cabinet government.

In constitutional monarchy the King has the right to be informed and consulted on every major developments of the nation<sup>6</sup>. This is constitutional mandate. It is in the process of consultation that the King often has to caution the cabinet if it is going to take some wrong decision. Kings concerns must be taken seriously and it should not be ignored as a mere opinion. Leaders must not forget that the King has the experience of dealing with several governments and his advice may be very helpful. Normally speaking a King will be under pressure to listen to honest ministers and a tendency to disregard advices from dishonest ministers.

Much of the tensions in the King Cabinet relations in Nepal have been encountered in the major appointments in governmental posts such as members of the upper house, ambassadors, judges and members of the constitutional bodies. There will always be pressures from within and without the palace for the King to ignore the constitutional mandate and push through the appointment of near and dear ones to the King. The King has to manage this challenge. A right candidate can always be negotiated with the elected government. Like wise right candidate proposed by cabinet could always get

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*of,accession to,acceptance of or approval of treaties or agreements to which the kingdom of Nepal or His Majesty's Government is to become a party shall be as determined by law. (2) The laws to be made pursuant to clause (1) shall,inter alia,require that the ratification of, accession to, acceptance of or approval of treaties or agreements on the following subjects be done by a majority of two-thirds of the members present at a joint sitting of both Houses of Parliament :-(a) peace and friendship; (b) defence and strategic alliance; (c) boundaries of the Kingdom of Nepal;and (d) natural resources and the distribution of their uses: Provided that out of the treaties and agreements referred to in sub-clauses (a) and (d),if any treaty or agreement is of an ordinary nature,which does not affect the nation extensively, seriously or in the long term,the ratification of, accession to, acceptance of or approval of such treaty or agreement may be done at a meeting of the House of Representatives by a simple majority of the members present.*

<sup>6</sup> Article 43 of the Constitution of Nepal reads as follows:

*(1) It shall be the duty of the Prime Minister to inform His Majesty of the following matter:*

- (a) decision of the Council of Ministers regarding the administration of the Kingdom of Nepal;*
- (b) Bills to be introduced in Parliament;*
- (c) such other information as commanded by His Majesty on matters mentioned in sub-clauses (a) and (b); and*
- (d) the current general state of affairs of the country, matters concerning peace and security in the country, matters of political, social and administrative concerns, and matters concerning international relations.*

*(2) His Majesty may make recommendations to, or appreciations of, or admonitions to, the Council of Minister on matters of national importance.*

through the palace. But the King and cabinet should never bargain with each other in pushing through their candidates. Constitutional monarchy believes in consultation not bargain. The observers of constitutional behaviors of the King and the Cabinet in Nepal has reasons to believe that the bargain must have taken place at times, overt or covert, in important appointments.

In the system of constitutional monarchy, the King always acts on the aid and advice of the elected government<sup>7</sup>. This is the reason why constitution refuses to hold the King accountable for any governmental decision. The principle that the "King can do no wrong" carries the spirit and soul of constitutional monarchy. The whole idea is that the cabinet is ultimately accountable for whatever is done in the name of the King. Cabinet is accountable for not only what it advises the King but also for all those that the King does against the advice of the cabinet. Cabinet either takes the responsibility for what the King does or it resigns in protest. A cabinet that does not resign in protest takes the ownership of the King's decision and must face the people and parliament for its consequences. There could however be times when the cabinet has to make a hard choice when the King takes a different stand. Confrontation has to be often weighed against conciliation. Choice is often dictated by political calculations. There are times when the country is in hung parliament and government remains in shaky conditions. These are the times when the government remains weak and vulnerable. These are the times when the King may be in a position to push through any decision through the cabinet without much resistance. Temptation to take advantage of situation may be very high. There could be pressure from within and without palace. These could be testing times for the King. There are allegations in Nepal that some of the decisions to increase the royal perks were pushed through when the government was shaky and vulnerable. These decisions not only bring the crown in to controversy but also make it unpopular.

In constitutional monarchy King must be extra cautious in his dealing with politicians. Politicians often lie, misrepresent the facts and change the opinion now and then. There could be times when a political party deliberately tries to drag the crown in to party politics for its own vested interest. The King must be alert in these matters. In the early days of constitutional monarchy in Nepal, the opposition party often called upon the King to act against the highhandedness of the ruling party not realizing that it goes against the spirit of the constitutional monarchy for the King to intervene in such matters. Mention may be made of the case where the opposition party led by United Marxist Leninist and faction of the ruling party led by Krishna Prasad Bhattarai jointly approached the then King to disregard the recommendation of the Prime Minister Girija Prasad Koirala to dissolve the Parliament. This was one instance where political leaders were calling upon the constitutional monarch to take side in party politics at the cost of the constitutional mandate. To put in the words of Sir Ivor Jennings in *Cabinet Government*, "The King is entitled to identify himself with a particular set of measures or a particular set of party politicians, for if he does, he himself becomes a politician, entitled to be criticized and attacked like other politicians. The justification for his higher position and the principles

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<sup>7</sup> There are however exceptions to this rule in the constitution of Nepal. They are the powers of the King to make succession law, rules governing employees in palace, rules governing certification of the crown's decisions. See Annex to this article.

which have been established to keep his acts out of controversy will then have disappeared, and he must expect that steps will be taken to limit his powers and influence."

The experience with the constitutional monarchy in Nepal over the past ten or eleven years during the reign of Late King Birendra, may be characterized as disappointing. The people expected the King to play the role of a friend philosopher and guide to the elected government. People even expected the King to warn and caution the government for their irresponsible behavior. King Birendra instead preferred to remain resigned, neutral, non-reactive and helpless witness to deteriorating situation of the country.<sup>8</sup> There were times when the ruling and opposition parties confronted on issues of national importance due to sharp differences of opinion. In those trying times of Nepal, King was expected to play a mediating role and resolve the matter through non-partisan advice in national interest and democracy. This kind of role from King was lacking in time of need.

The relation between the crown and the political parties in Nepal remained formal and frigid. Neither of them could gain each others confidence. The elected government failed to win the confidence of the King as a result of which it also lost the much needed spontaneous and willing cooperation of Royal Nepal Army which was so important in its fight against the Maoist insurgency in Nepal. There was no doubt elected government to aid and advice the King, parliament to hold the government accountable for their day to day governance, general election to make the parliament accountable to people. And yet the system failed in delivery of service to the satisfaction of the people. Failure of the parliament to tame the irresponsible and unaccountable ministers and the failure of the election system to give a better alternative government compelled the helpless people to look for the King to take some step by way of corrective measure. Inability of the government to cope with the issues of corruption, poverty, gender discrimination, ethnic alienation and social injustice provided a fertile ground for Maoist movement<sup>9</sup>. The conflict situation and failure of multi-party government has led to takeover of the government by the King Gyanendra Bir Bikram Shah Dev, the only surviving brother of the late King Birendra, thereby ending brief honeymoon period of the people of Nepal with the system of constitutional monarchy. Presently the government is led by the King and country is passing through difficult times. There is no constitutional monarchy in practice in Nepal right now but there is a royal promise to honour its principles and

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<sup>8</sup> Role of the King in constitutional monarchy is not to be equated with a nominal, ceremonial and titular head of state. He is also not to be equated with a rubber stamp. Constitutional monarch has an important role to play in his own right. He has to use his wisdom and act according to need of the time to help the elected government take its right decision. A non-reactive and non-reflective monarch will never help the institution of constitutional monarchy to be institutionalized. He has a right and duty to react on each and every advice of the elected government. He may express opinions on ministers conduct. He may influence their action. He may delay decisions for reflections. He may refuse assent up to a point where he is obliged to choose between accepting it and losing their services. If the King believes advice to him to be wrong, he may refuse to take it and if his minister yields, the King is justified. If the minister persists, feeling that he has behind him a majority of the peoples representatives a constitutional sovereign must give way.

<sup>9</sup> Maoist movement in Nepal has led to killing of over ten thousand people, including army and police on the government side.

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restore its spirits in near future. Nepal's honeymoon with constitutional monarchy has left us with many lessons and its time that Bhutan learns from those lessons in time.

If Bhutan really mean what it has committed in the proposed draft constitution, it must not forget that the stable constitutional monarchy comes with responsible government, due respect for royal family, fair election, morality in politics, pro-poor socio economic policies, equality and justice to all ethnic communities, rule of law and independence of judiciary.

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Annex

**CONSTITUTIONAL POSITION OF THE KING**

(This table is not exhaustive so far as provisions related to the King is concerned. Table list only remarkable provisions for the paper.)

Article	Provision	Comments
Article 27	Declares His Majesty as a symbol of unity and nationality of Nepal	Its an ornamental provision and it has no implication on the power of the King. It only reminds the King about its model role as a father of all the castes and ethnicity of Nepal.
Article 30 (1)	Exempts all incomes and property of His Majesty from all kinds of taxation, fees and other similar charges	This provision should not be interpreted to include incomes earned by the King through his investments in businesses and corporate transactions.
Article 30 (2)	Makes the property of His Majesty inviolable	It takes away the power of the state to nationalize royal property of the King.
Article 31 (1)	Provides immunity to the King from prosecution in court of law for any act of His Majesty in official capacity.	This immunity is granted on the constitutional presumption that the King does not take the decision. King act only on the advice of the elected government or any other officer or constitutional body as provided by the constitution.
Article 56	Restriction on debate in parliament regarding conduct of his majesty the King.	Constitution tries to keep the King above the party politics and parliamentary discussion. This however does not mean that the conduct of the royal family is exclude from public debate outside the parliament.
Article 28	Power to make law on succession	This power is exclusively exercised by the King in his sole discretion. In England this power belongs to the Parliament.
Article 35(2)	King-cabinet relation	King acts on the advice of the council of ministers.
Article 36	Formation of council of ministers	King appoints the person with majority support in Parliament as the Prime Minister and on his or her recommendation other members of the council of ministers.
Article 43	Right to information, caution, encourage	This is the most important right of the King. He exercises this right while dealing with cabinet.
Article 53	Dissolution of parliament	Dissolution of parliament is recommended by the Prime Minister but the King is not bound to Act on it unless it is constitutionally sound and the recommending prime minister has the backing of majority in House of Representatives.
Article 34	<ul style="list-style-type: none"> <li>▪ Hiring and firing of Raj Parishad (Privy Council) members except ex-officio members</li> <li>▪ To call and preside over Raj Parishad meeting</li> <li>▪ To fix the remuneration of the standing committee members of the Raj Parishad</li> <li>▪ To decide on the incapacity of the King to remain head of the state</li> </ul>	There is no provision for impeachment of the King in Nepal. If the King becomes incapable for any physical or mental reasons, it is the privy council (Raj Parishad) which takes a final decision and the successor is announced. In the absence of qualified successor, a regent or council of regency is announced to take upon the task of the Head of the state.

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Article 118/119	Supreme commander of the army and is to act according to advice of the Defense Council.	King is supreme commander of the army by constitutional declaration just as the president of India is. King is suppose to act as per the advice of the Defense Council led by Prime Minister in the mobilization of the army. In reality King holds decisive influence on the Army.
Article 121	To make the rules relating to conditions of service of the employees of royal palace.	This provision is made to provide the autonomy to internal affairs of the palace.
Article 71	Power to ask the parliament for reconsideration and assent on Bills passed by parliament	This power is to be exercised on the recommendation of the cabinet.
Article 116	Assenting amendment of the constitution	King has no option but to assent the constitution amendment bill once it is passed by special majority in both Houses of Parliament.
Article 27 (2)	King shall obey and preserve the constitution	It reminds the duty of the King to abide by the constitution.
Article 29	Expenditures and Privileges relating to His Majesty and the Royal Family	Expenditures and privileges are to be determined by law and constitution restricts the law to give less than what is already available.
Article 32 (2)	Power of His Majesty to appoint his representative in his absence	This power is exercised without the advice of the elected government. King should normally inform about the decision to the Prime Minister.